

HONORABLE MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SCOTT KINGSTON,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION, a New York Corporation,

Defendant.

No. 2:19-cv-01488-MJP

**INTERNATIONAL BUSINESS  
MACHINES CORPORATION'S REPLY  
BRIEF IN SUPPORT OF ITS PARTIAL  
MOTION TO DISMISS PLAINTIFF'S  
AMENDED COMPLAINT**

**NOTE ON MOTION CALENDAR:  
January 17, 2020**

Defendant International Business Machines Corporation ("IBM" or "Defendant"), pursuant to Fed. R. Civ. P. 12(b)(6), has moved this Court to dismiss Count II (breach of express unilateral contract), Count III (breach of implied-in-fact contract), Count IV (violation of RCW 49.48.010 – unpaid wages on termination), Count V (failure to pay wages pursuant to RCW 49.52.050), and Count VI (unjust enrichment) of Plaintiff Scott Kingston's ("Plaintiff") Amended Complaint. [Doc. No. 24.] On January 13, 2020, Plaintiff filed his response in opposition to IBM's Motion. [Doc. No. 25.] IBM respectfully submits this Reply Brief in Support of Its Partial Motion to Dismiss.

**A. The Court Should Dismiss Plaintiff's Breach of Unilateral Contract and Breach of Implied-In-Fact Contract Claims.**

Plaintiff alleges two types of breach of contract claims: (1) that his IPL created a unilateral contract (Count II), and (2) that IBM's conduct by requesting Plaintiff perform

1 services, including managing sales representatives created an implied-in-fact contract (Count  
 2 III). (Am. Compl. ¶¶ 74, 78, 82, 85.) In response to IBM's Motion, Plaintiff failed to  
 3 demonstrate that his Amended Complaint states a claim for breach of contract under either  
 4 theory.

5 As an initial matter, Plaintiff does not dispute that both contract theories require proof of  
 6 mutual assent to the alleged contract's terms by both parties. *Landes v. Cuzdey*, No. 51841-4-II,  
 7 2019 Wash. App. LEXIS 2218, at \*16 (Wash. Ct. App. Aug. 20, 2019). *Heaton v. Imus*, 93  
 8 Wn.2d 249, 252 (1980) (quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn.2d 363,  
 9 368 (1956)).<sup>1</sup> Plaintiff seeks to insert his own subjective belief regarding the intent of the  
 10 parties, but the law is clear that he cannot do so; rather, mutual intent must be gleaned from the  
 11 parties' outward manifestations. *Landes*, 2019 Wash. App. LEXIS 2218, at \*16. Here, IBM  
 12 made its intentions clear in the plain terms of the IPL. While the IPL was an agreement between  
 13 the parties which spelled out their respective rights and responsibilities relating to commission  
 14 payments, the terms of the IPL make it clear that IBM had no contractual obligation to pay  
 15 Plaintiff any additional commissions beyond what it already paid him considering the significant  
 16 discretion IBM retained in the IPL. IBM's conduct surrounding Plaintiff's IPL obviates the  
 17 existence of any "mutual assent" to form such an obligation.

18 Second, as explained in IBM's Motion, every court that has considered IBM's  
 19 commission plan in the context of a breach of contract claim has dismissed such claims. *See*,  
 20 *e.g.*, *Wilson v. IBM*, 610 Fed. App'x 886, 888-89 (11th Cir. 2015); *Kavitz v. IBM*, 458 F. App'x  
 21 18 (2d Cir. 2012); *Geras v. IBM*, 638 F.3d 1311 (10th Cir. 2011); *Jensen v. IBM*, 454 F.3d 382  
 22 (4th Cir. 2006); *Snyder v. IBM*, 2019 U.S. Dist. LEXIS 66583 (N.D. Ga. Mar. 18, 2019); *Morris*  
 23 *v. IBM*, 2018 U.S. Dist. LEXIS 222568 (W.D. Tex. Nov. 29, 2018), *adopted by* 2019 U.S. Dist.  
 24 LEXIS 39553 (W.D. Tex. Feb. 4, 2019); *Fessler v. IBM*, No. 1:18-cv-798, 2018 U.S. Dist.  
 25 LEXIS 202725 (E.D. Va. Nov. 28, 2018); *G.S. (Steve) Rapier v. IBM*, No. 1:17-cv-4640-MHC,

26  
 27 <sup>1</sup> *See also Hoglund v. Meeks*, 139 Wn. App. 854, 870 (2007); *Bell v. Hegewald*, 95 Wn.2d 686, 690 (1981).

1 2018 U.S. Dist. LEXIS 117504 (N.D. Ga. Apr. 12, 2018); *Pfeister v. IBM*, No. 17-cv-03573-  
2 DMR, 2017 U.S. Dist. LEXIS 170970 (N.D. Cal. Oct. 16, 2017); *Kemp v. IBM*, No. 3:09-cv-  
3 03683, 2010 U.S. Dist. LEXIS 118801 (N.D. Cal. Nov. 4, 2010); *Schwarzkopf v. IBM*, No. C 08-  
4 2715, 2010 U.S. Dist. LEXIS 46813 (N.D. Cal. May 12, 2010); *Gilmour v. IBM*, No. CV 09-  
5 04155, 2009 U.S. Dist. LEXIS 127142 (C.D. Cal. Dec. 16, 2009); *Rudolph v. IBM*, No. 09 C  
6 428, 2009 U.S. Dist. LEXIS 75261, at \*9-11 (N.D. Ill. Aug. 21, 2009). Plaintiff cannot cite a  
7 single case which did not dismiss such claims.

8 Plaintiff attempts to distinguish these cases by arguing that they did not apply  
9 Washington law which “has a strong policy in favor of payment of wages due employees.” But  
10 Plaintiff is ignoring the fact that each of these cases applied black letter contract law which  
11 varies little (or not at all) from state to state; and the concept of “mutual assent” is universal in  
12 the context of contract law. The fact that no Washington court has addressed IBM’s commission  
13 plan yet does not make these cases any less applicable in this situation.

14 Plaintiff also contends that the foregoing cases are distinguishable because some of them  
15 were decided on summary judgment and because some of them involved IPLs which had slightly  
16 different disclaimer language. As an initial matter, 8 of the foregoing cases (*Geras, Morris,*  
17 *Fessler, Rapier, Pfeister, Kemp, Gilmour, and Rudolph*) were decided on motions to dismiss or  
18 motions for judgment on the pleadings. Moreover, this argument ignores the remaining  
19 disclaimers in Plaintiff’s IPL which double down on IBM’s discretion to adjust Plaintiff’s  
20 commissions.

21 Lastly, Plaintiff argues that the disclaimers in the IPL are not enforceable because  
22 Washington law only permits prospective changes to the terms of an employee’s compensation.  
23 Plaintiff is oversimplifying Washington law and misstating IBM’s position. Here, IBM did not  
24 change the terms of Plaintiff’s commission plan, IBM *applied* the terms of that plan. There are  
25 no allegations in the Amended Complaint to the contrary, nor is there any allegation that IBM  
26 made any retroactive change to the terms of Plaintiff’s commission plan. Plaintiff misconstrues  
27 Washington law by implying that Washington law never permits an employer to determine, at its  
28

1 discretion, the amount of commissions to pay to an employee. Washington law does not prohibit  
 2 discretionary commission plans, and Plaintiff has cited no authority to the contrary.<sup>2</sup> The case  
 3 Plaintiff does rely on for this point – *Redman v. Nevada Bell Tel. Co.* – is inapposite, as that case  
 4 applied Nevada law and is contrary to every other court which has addressed the specific terms  
 5 of IBM’s commission plan.

6 In short, Plaintiff does not dispute that the IPL governed the terms of his commission  
 7 payments. Yet Plaintiff asks the Court to apply the terms in the IPL which are favorable to him  
 8 and ignore the rest. As the Eleventh Circuit aptly held in *Wilson*, “[t]he IPL may indeed include  
 9 terms that are very favorable to IBM, but those are the terms Mr. [Kingston] admittedly  
 10 accepted. Mr. [Kingston] cannot argue that the IPL is an enforceable contract on the one hand,  
 11 while refusing to accept its disadvantageous terms on the other.” *Wilson*, 610 F. App’x at 889.  
 12 Consistent with the other courts who have addressed this issue, this Court should grant IBM’s  
 13 Motion and dismiss Counts II and III of the Amended Complaint.

14 **B. The Court Should Dismiss Plaintiff’s Claim for Violation of RCW**  
 15 **49.48.010.**

16 Plaintiff’s claim under Rev. Code of Wash. § 49.48.010 for IBM’s alleged failure to pay  
 17 wages upon termination is also subject to dismissal. As explained above and in IBM’s Motion,  
 18 Plaintiff cannot show that he was due any additional amount in commissions – whether at the  
 19 time of his termination or otherwise – in light of the clear disclaimers in his IPL. Plaintiff’s  
 20 claim for violation of RCW 49.48.010 fails for this reason alone.

21 Moreover, also as explained in IBM’s Motion, according to Plaintiff’s own allegations in  
 22 the Amended Complaint, it was only after his termination that adjustments were allegedly made  
 23 to deals closed by sales representatives reporting to Plaintiff. (Am. Compl. ¶¶ 58-59.) Thus, it  
 24 would have been impossible for IBM to pay Plaintiff these additional commissions upon his  
 25 termination. Plaintiff contends that the “Leaving the Plan Early” section of his IPL helps him on  
 26 this point, but it does not. As an initial matter, this is yet another example of Plaintiff cherry-

27 <sup>2</sup> Indeed, IBM cited numerous cases in its Motion supporting the proposition that discretionary incentive plans are  
 28 lawful under Washington law.

1 picking portions of his IPL which he believes help his case and ignoring the remaining terms of  
 2 the IPL. In any event, the “Leaving the Plan Early” section provides that “your final  
 3 achievement . . . will be based on business results credited to you as of the last day of the last  
 4 full-month you were on that Plan.” The last day of the last full-month Plaintiff was employed by  
 5 IBM was March 31, 2018. (Am. Compl. ¶ 55.) According to Plaintiff’s own allegations, the  
 6 alleged adjustments which resulted in increased revenue did not occur until *after* March 31,  
 7 2018, meaning they were not “credited to” Plaintiff as of that date. Thus, Plaintiff’s argument  
 8 regarding the “Leaving the Plan Early” section of the IPL does not save his claim under Rev.  
 9 Code of Wash. § 49.48.010.

### 10 **C. The Court Should Dismiss Plaintiff’s Failure to Pay Wages Claim.**

11 Plaintiff claim under Rev. Code of Wash. § 49.52.070 similarly fails. As an initial  
 12 matter, this claim fails because there was no agreement which obligated IBM to pay Plaintiff  
 13 additional commissions beyond what he was already paid. In response to IBM’s Motion,  
 14 Plaintiff does not dispute the standard applicable to this claim, but instead contends he did  
 15 sufficiently allege an obligation by IBM to pay additional commissions because he alleged in the  
 16 Amended Complaint that: (1) he had an explicit or implied contract with IBM; (2) IBM was  
 17 obligated to pay him commissions; (3) IBM owed him those commissions; and (4) IBM failed to  
 18 pay him commissions owed under state law. These, of course, are nothing more than conclusory  
 19 allegations which this Court must ignore when evaluating IBM’s Motion. *Ashcroft v. Iqbal*, 556  
 20 U.S. 662 (2009). Plaintiff’s RCW § 49.52.070 claim should be dismissed for this reason alone.  
 21 *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203-1204 (9th Cir. 2002) (“The insertion of the  
 22 word ‘obligated’ indicates a pre-existing duty imposed by contract or statute to pay specific  
 23 compensation.”).

24 Moreover, as explained in IBM’s Motion, to assert a claim under RCW § 49.52.070,  
 25 Plaintiff must show IBM paid him a lower wage than he was entitled “[w]ilfully and with intent  
 26 to deprive the [Plaintiff] of any part of his [] wages.” Plaintiff concedes in his response that, to  
 27 the extent a bona fide dispute exists regarding the payment of the wages in question, his RCW §

49.52.070 fails. The numerous cases cited above and in IBM's Motion dismissing nearly identical claims show that, *at a minimum*, IBM's position is "objectively reasonable" and "fairly debatable." Thus, Plaintiff's RCW § 49.52.070 also fails for this reason. *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 293 (1973) (holding that Chapter 49.52 RCW is "not meant to apply to this factual situation; herein, there was a bona fide disagreement between employer and employee with regard to whether a year-end payment was earned wages or merely a discretionary bonus."); *Hemmings*, 285 F.3d 1174, 1203-1204 (noting that "the Washington Supreme Court has not extended the reach of RCW § 49.52.050 to instances, such as the one at bar, in which there is a bona fide dispute as to whether the employer is obligated to pay the amounts in question.").

#### **D. The Court Should Dismiss Plaintiff's Unjust Enrichment Claim.**

Plaintiff has also failed to save his unjust enrichment claim. As explained in IBM's Motion, numerous other courts who have addressed this type of claim have found that the plain terms in IBM's commission plans foreclose such claims. Plaintiff failed to effectively distinguish these decisions. First, Plaintiff does not even address the decisions in *Snyder*, *Fessler*, or *Pero*. Moreover, Plaintiff's attempts to distinguish *Middleton*, *Morris*, and *Martignetti* by contending that those courts did not apply Washington law again fall flat; the general law governing quasi-contractual claims like Plaintiff's unjust enrichment claim does not materially vary. The bottom line is that the IPL provided IBM with discretion regarding Plaintiff's commission payments, which numerous courts have held preclude plaintiffs from arguing that IBM's failure to pay them additional commissions was "unjust." Plaintiff's claim suffers the same fatal flaw.

#### **E. Conclusion.**

Just as the numerous other courts cited above have done, here the Court should find that the plain terms of Plaintiff's IPL foreclose his claim for unpaid commissions. For the foregoing reasons, IBM respectfully requests that the Court grant its Motion and dismiss Counts II, III, IV, V, and VI of Plaintiff's Amended Complaint.

1 DATED this 17th day of January, 2020.

2 Respectfully submitted,

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the United States of America that on this day, I electronically filed a true and accurate copy of the document to which this declaration is affixed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:


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